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IN THE SUPREME COURT 1975
OF THE STATE OF UTAH
BRIGHAM YOUNG UNIVERSITY,
J. Reuben Clark Law School

STATE OF UTAH,
Plaintiff-Respondent,

vs.

CHARLES ALBERT WINNING,
Defendant-Appellant.

Case No.
13835

BRIEF OF APPELLANT

BRIEF IN SUPPORT OF APPELLANT'S
MOTION FOR REHEARING

Appeal from a sentence and commitment in the
Third Judicial District Court, in and for Salt Lake County,
State of Utah, the Honorable Jay E. Banks, presiding.

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FILED

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

vs.

CHARLES ALBERT WINNING,

Defendant-Appellant.

Case No.
13835

BRIEF OF APPELLANT

BRIEF IN SUPPORT OF APPELLANT'S MOTION FOR REHEARING

STATEMENT OF THE NATURE OF THE CASE

The Appellant appealed from, a sentence and commitment of the Third District Court. Appellant is now before this court on a motion for rehearing after this court rendered an opinion denying Appellant's request to be resentenced with credit for jail time prior to sentencing.

DISPOSITION ON APPEAL

Appellant appealed to this court from a sentence

and commitment in which the sentencing court imposed a maximum sentence and refused to give credit for pre-sentence jail time incurred by Appellant due to financial inability to make bail. In an opinion filed February 14, 1975, this court affirmed the judgement of the lower court.

RELIEF SOUGHT ON REHEARING

Appellant seeks to have this court vacate its opinion affirming the lower court and to remand the case for resentencing with instructions to allow Appellant credit against the maximum sentence for time spent in jail by reason of Appellant's financial inability to make bail.

STATEMENT OF FACTS

Appellant was booked into Salt Lake County Jail on June 17, 1974 under a charge of auto theft. He was found indigent by the Salt Lake City Court and was appointed counsel (T. 2). After a continuance of the preliminary hearing date at the request of Respondent (T. 2), Appellant was bound over for trial in Third District Court. On the date set for trial, August 30, 1974, Appellant entered a plea of guilty to a lesser included Class A Misdemeanor (T. 15, 29).

Appellant waived time for sentencing and was sentenced to the maximum sentence (T. 15, 29). The sentencing court refused to give appellant credit for pre-sentence time incurred by reason of Appellant's inability to make bail (T. 30).

ARGUMENT

POINT I

THIS COURT ERRED BY RENDERING ITS OPINION IN THIS APPEAL WITHOUT CONSIDERATION OF POINT IV OF APPELLANT'S INITIAL BRIEF.

The opinion of this court filed on February 14, 1975, is based upon two grounds: the prior opinion of this court in *State v. Jaramillo*, 25 Utah 2d 328, 481 P. 2d 394; and a factual distinction between the instant case and *North Carolina v. Pierce* cited in Appellant's initial brief. Neither of these grounds meet Appellant's strongest argument presented on appeal.

Appellant acknowledges that *Pierce* involved time served pending appeal and retrial and is therefore not factually identical to this appeal. The arguments in Points I and III of Appellant's initial brief and the use of *Pierce* in those arguments was only by way of analogy. Point IV of Appellant's initial brief deals more squarely with the facts in the instant case. With the exception of *Williams v. Illinois*, all cases cited in Point IV relate directly to the denial of equal protection which results when a defendant is not given credit for pre-sentence or pre-commitment incarceration served because of financial inability to post bail.

The opinion of this court and the initial brief of Respondent do not squarely meet the facts of this case

and argument made in Point IV of Appellant's initial brief. In support of this contention, Appellant submits the following sub-points I(A) and I(B) to be considered in conjunction with Point IV of Appellant's initial Brief on Appeal.

POINT I(A)

STATE V. JARAMILLO IS SIGNIFICANTLY DISTINGUISHABLE FROM THE INSTANT CASE. IT WOULD BE A DENIAL OF EQUAL PROTECTION TO EXTEND JARAMILLO TO REFUSE CREDIT FOR PRE-SENTENCE INCARCATION WHERE SUCH INCARCERATION RESULTED FROM FINANCIAL INABILITY TO POST BAIL AND THE FAILURE TO GIVE CREDIT RESULTS IN INCARCERATION BEYOND THE MAXIMUM LEGAL SENTENCE.

In the *State v. Jaramillo*, 25 Utah 2d 328, 481 P. 2d 394, this court held that a sentencing court did not have to credit the face of a commitment for an offense on which the defendant had already served time pending appeal and reconviction. The specific sentence in *Jaramillo* was for an indeterminate term of five years to life and the opinion of the court pointed to the impossibility of making an advance computation of the date on which the maximum sentence would expire. The ruling in *Jaramillo* was also based on reasoning that the

Board of Pardons should and would consider the time served prior to re-commitment in determining an appropriate parole date.

This same reasoning can be applied where a judge sentences to less than the maximum term for a misdemeanor. Similar to the position of the Board of Pardons, the court can determine an appropriate release date based on the defendant's background, the facts of the case, and the time the defendant has been incarcerated prior to sentencing. If a defendant has served two months prior to sentencing and the judge feels that six months confinement is called for on a possible twelve-month sentence, the judge can simply impose a sentence of four months. There are only a few small practical differences between sentencing such a defendant to six months with credit or four months without credit.

This reasoning and the similar rationale of *Jaramillo* do not hold up under the equal protection argument made under the facts in the instant case. Appellant was financially unable to post bail and therefore spent seventy days in jail prior to sentencing. Appellant was then sentenced to the maximum term and denied credit for his seventy days of pre-sentence incarceration. The result is that Appellant is held in confinement beyond the maximum time authorized by the legislature for his particular offense. His economic status has thereby subjected him to more severe treatment than similarly situated defendants who have the resources to post bail.

Some judges may impose a maximum sentence only in cases involving high culpability or an extensive prior record. This, however, does not justify a denial of equal protection within the class of defendants who receive a maximum sentence. "Equality of treatment of classes similarly situated must be maintained." *Slater v. Salt Lake City*, 115 Utah 476, at 496, 206 P. 2d 153, at 164.

Under the equal protection clause of the Fourteenth Amendment, economic status is a constitutionally prohibited basis for different treatment of similarly situated defendants. *Williams v. Illinois*, 399 U. S. 235 (1970). Yet, this exact type of discrimination against Appellant has been affirmed as a result of this court rendering its opinion without considering *Williams* and the other cases submitted in Pont IV of Appellant's initial brief. Appellant's economic status is the only reason he is facing incarceration beyond the maximum time which could be imposed on a similarly classified defendant who could post bail.

POINT I(B)

THE CASES CITED IN RESPONDENT'S INITIAL BRIEF ARE NOT IN POINT WITH THE FACTS OF THIS CASE AND THE AUTHORITIES CITED IN POINT IV OF APPELLANT'S INITIAL BRIEF.

The cases cited in Point IV of the Respondent's initial brief are used by Respondent in a way which misrepresents the actual holding in those cases.

On page 8 of Respondent's brief, *Sobell v. Attorney General of the U. S.*, 400 F. 2d 986, is cited for the proposition that a defendant who is financially unable to make bail is not denied equal protection by a refusal of the sentencing court to grant credit for pre-sentence confinement. This, however, was not the holding reached in *Sobell*.

The court in *Sobell* was asked to consider two entirely separate issues: 1) whether the defendant could use the Administrative Procedure Act and the Declaratory Judgement Act to exercise a federal statutory right which allowed credit for time served prior to sentencing; and 2) whether the defendant was entitled to credit for time spent in jail pending appeal. As to the first issue the court held it should not hear the matter because the sentencing court was the proper forum for the defendant to assert his claim. Contrary to what this court may have been led to believe by Respondent's brief, equal protection was neither raised or discussed in *Sobell* as being a basis for receiving pre-sentence credit.

In regard to the second issue in *Sobell*, whether the defendant had an equal protection right to receive credit for confinement pending appeal, the court made the following statement:

It is true that, as between one who could afford bail and one who could not, it worked a hardship on the latter *if he elected not to commence serving his sentence*. But this consequence flowed from what we must assume was a proper imprisonment. While the result may be unfair it is not sufficiently invidious to reach constitutional proportions. 400 F. 2d at 990. (Emphasis added.)

Except for the emphasized portion, this quote was erroneously cited by Respondent as being the basis of the court's decision on the first issue in *Sobell*. The section of the above quote which is emphasized herein but omitted in Respondent's brief clearly limits and distinguishes the basis for the equal protection decision in *Sobell*. The defendant had *elected* not to commence the service of his sentence pending appeal, and it was under this critically distinguishing factor that the court held a failure to credit time served was not so unfair as to reach constitutional proportions.

Similarly, *Sullivan v. Cupp*, 462 P. 2d 455 (Or. 1970) cited at page 8 of Respondent's initial brief is not in point. The defendant in that case had also elected to remain in jail instead of starting his prison commitment pending appeal.

The next case used by Respondent is *Rigney v. Hendrick*, 355 F. 2d 710, cited and quoted at page 9 in Point IV of Respondent's brief. In using *Rigney*, Respondent creates the false impression that the issue in

the case was whether an indigent defendant had an equal protection right to credit for pre-trial confinement. In fact, the case deals with a substantially different issue. The question in *Rigney* was whether equal protection of law was violated because jail inmates who could not post bail were required to participate in line-ups while those who were free on bail could only be used in a line-up if they were arrested and charged with the crime for which they would be viewed.

The last case cited in Point IV of Respondent's brief, *United States v. Erwing*, 268 F. Supp. 879, is also in a different ball park. That case relates to the criteria which should be used in setting bail and does not address the issue of whether a defendant has a right to credit for pre-sentence confinement.

Respondent's initial brief cites several cases in which credit for time served was not allowed. These cases and others that can be found with similar holdings involve one or more of the following significant distinctions: the sentence actually imposed plus the time of pre-sentence incarceration did not exceed the maximum sentence; the sentence was for an indeterminate term; there was no showing of discrimination based on the fact the defendant was indigent; the offense was not bailable; the defendant exercised a power of election to remain in jail instead of being committed to prison pending appeal.

The critical distinctions between the cases relied upon by Respondent and the significant facts in the instant case is exemplified by a comparison of *Gremillion v. Henderson*, 425 F. 2d 1293 (5th Cir. 1970) cited at page four of Respondent's initial brief and the subsequent decisions of the Fifth Circuit in *Hart v. Henderson*, 449 F. 2d 183 (5th Cir. 1971) cited at pages six and eleven of Appellant's initial brief.

In *Gremillion* the defendant had not been given the maximum sentence and there was no showing that his failure to make bond was based on economic status. Under these circumstances the court held the defendant did not have a right to credit for pre-sentence incarceration. *Gremillion*, however, is clearly distinguishable from the instant case because Appellant's status as an indigent resulted in a term of incarceration beyond the maximum legal sentence.

The Fifth Circuit's decision in *Hart v. Henderson* states:

We hold here that the inability of an indigent criminal defendant to make bond should not result in extending the duration of his imprisonment beyond the statutory maximum. 449 F. 2d 183, at 185.

The holding in *Hart* is reaffirmed by the Fifth Circuit's opinion in *Hill v. Wainwright*, 465 F. 2d 414 (1972) where it is stated:

A state prisoner who has received the maximum impossible prison sentence for an offense must be given credit for all pre-sentence jail time if he was unable to make bail due to his indigence. 465 F. 2d 414, at 415.

CONCLUSION

This case involves two significant facts. Appellant was given the maximum statutory sentence and he was not allowed credit for pre-sentence confinement incurred by reason of his indigency. Because of these two factors, Appellant was denied equal protection of law vis a vis a defendant who similarly received the maximum sentence but who was financially able to post bail.

This court erred in rendering its opinion in this appeal without addressing the equal protection argument presented in Point IV of Appellant's initial brief. This court should therefore reconsider this appeal and remand the case to the lower court with instructions to credit the appellant's commitment with the time Appellant spent in jail prior to sentencing the lower court.

In contrast to the result reached in the opinion this court filed February 14, 1975, Appellant invites the attention of this court to four recent decisions from neighboring jurisdictions: *Anglin v. State*, 525 P. 2d 34 (Nevada, 1974), holding equal protection requires that those who are financially unable to make bail must be

given pre-sentence credit towards the maximum term, the minimum term, and good time credits; *Reanier v. Smith*, 517 P. 2d 949 (Wash., 1974), holding that equal protection requires credit for pre-sentence hospital detention and credit towards the mandatory minimum on a non-bailable offense with a life top; *Thompson v. State*, 496 P. 2d 651 (Alaska, 1972) ordering that credit on an indeterminate sentence be granted a defendant who could not make bail and negotiated a plea during trial; and *State v. Sutton*, 521 P. 2d 1008 (Ariz., 1970) holding that incarceration beyond the statutory limit violates the principle of separation of powers by allowing the executive or judicial branch to punish a defendant in excess of that which the legislature has allowed.

Respectfully submitted,

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